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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

APPEAL FROM THE SUPREME COURT OF
THE STATE OF MICHIGAN

THE CITY OF DETROIT, a municipal corporation,
Plaintiff-Appellant,
v.
DETROIT POLICE OFFICERS ASSOCIATION,
an unincorporated labor organization,
Appellee,
and
GEORGE E. BOWLES, AUBREY
McCUTCHEON and WILLIAM L. KIRCHER,
Appellees,
and
DETROIT FIRE FIGHTERS ASSOCIATION,
Appellee.

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Michigan's Compulsory Arbitration Law, 1969 PA 312, violates Fourteenth Amendment standards of equal protection and due process by transferring critical, budgetary decision-making authority from Detroit's duly-elected officials to an arbitration panel which is provided neither ascertainable standards to guide its actions, nor sufficient flexibility to reach awards which even panel members can agree are fair and reasonable.

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In the matter of: *City of Detroit, Public Employer, and Detroit Police Officers Association, Labor Organization. Act 312 Main Agreement*: Opinion and Award, Act No. 312 Arbitration Proceeding Before: George E. Bowles, Chairman; Aubrey V. McCutcheon, Jr., Employer Delegate; and William L. Kircher, Union Delegate (State of Michigan, Employment Relations Commission, Act No. 312 Compulsory Arbitration Panel, Detroit, Michigan, December 20, 1978) (Appendix B 1-92)

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THE CITY OF DETROIT, a municipal corporation,
Plaintiff-Appellant,
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DETROIT POLICE OFFICERS ASSOCIATION,
an unincorporated labor organization,
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GEORGE E. BOWLES, AUBREY
McCUTCHEON and WILLIAM L. KIRCHER,
Appellees,
and
DETROIT FIRE FIGHTERS ASSOCIATION,
Appellee.

JURISDICTIONAL STATEMENT

JURISDICTION

This appeal arises from a statutory Petition for Review under, and a challenge to the validity of the compulsory arbitration provisions of Michigan's Public Employment

Relations Act (Michigan 1969 PA 312) on grounds of repugnancy to the Constitution of the United States.

The judgment of the Michigan Supreme Court in favor of the Act's validity under the federal and state constitutions was entered on June 6, 1980. 408 Mich 410, 294 NW 2d 68. (1980). (Appendix A) A timely Motion for Rehearing was filed by the Appellant herein on June 26, 1980, and was denied by Order of the Michigan Supreme Court on July 15, 1980. 409 Mich 1011 (1980). (Appendix C) A timely Notice of Appeal was filed in the Michigan Supreme Court on September 2, 1980. (Appendix D)

The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, United States Code, Section 1257, subsection (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS APPEAL

Constitution of the United States, Fourteenth Amendment, Equal Protection and Due Process Clauses:

> "AMENDMENT XIV. — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

person within its jurisdiction the equal protection of the laws."

Constitution of the State of Michigan, Article 1, Section 1:

"All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."

Michigan Public Act 1969, No. 312, MCLA 423.231, et seq., M.S.A. 17.455(31), et seq.

The text is printed in the attached Appendix E 1-11.

Raising the Federal Question

Questions as to the Act's validity under the federal and state constitutions were first raised in the Wayne County Circuit Court, the trial court, in the Appellant's *Second Amended Complaint and Petition for Review Under Section 12 of Act 312*. The Circuit Court Judge, Honorable Victor J. Baum, deferred his final ruling on the constitutional challenge until after further briefing and argument. (Opinion, pendente lite, denying stay of arbitrator's award and enforcing award, 2-13-79, Appendix B 146-148), rendering only an interim ruling upholding the Act's constitutionality for purposes of denying the injunctive relief requested at that stage by the City.

At the next level of appellate review, the Michigan Court of Appeals, there was no opportunity for argument or rulings on the merits of the City's challenge to the statute. The Supreme Court of Michigan granted jurisdiction, by-passing the Court of Appeals as to the appeal on the merits. (Order of the Supreme Court of Michigan Granting Motion for Immediate Consideration and Staying Enforcement Pending Appeal, (Appendix B 185-186).

When the Supreme Court of Michigan issued its order on November 8, 1979 granting Motions for Immediate

Consideration and to Stay Enforcement Pending Appeal, the Court directed the parties to include among the issues to be briefed: "whether 1969 P.A. 312 is constitutional." (Appendix B 185)

The City raised the question of the Act's validity under the Constitutions of the United States and of the State of Michigan as follows:

> "1969 P.A. 312, insofar as it provides for compulsory arbitration, violates the United States Constitution and the Constitution of the State of Michigan by improperly delegating legislative and political responsibility to politically unaccountable arbitrators."
>
> (City Brief on Appeal to Michigan Supreme Court, p. 10)
>
> "The Act violates the Equal Protection clauses of the Constitutions of the United States and of the State of Michigan in that it deprives the citizens of the affected municipal constituencies of their right to cast effective ballots in municipal elections. . ."
>
> "1. The constitutionally protected right to cast an effective ballot cannot be impaired;"
>
> (City Brief on Appeal to Michigan Supreme Court, p. 19)
>
> "2. The right of voters to cast effective votes also gives them the right to have governmental decisions made by their elected representatives."
>
> (City Brief on Appeal to the Supreme Court of the State of Michigan, p. 21)

As to the first question of constitutional validity raised by the City, whether the Act constitutes an invalid delegation of authority, the Michigan Court rejected the City's challenge, supporting its decision in its opinion at *City of Detroit* v. *Detroit Police Officers Association, et al* 408 Mich 410; 294 NW2d 68 (1980). (Appendix A 37).

As to the second ground for challenge to the validity of the Act, based upon the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and upon the State Constitution, the Michigan Court disposed of the federal constitutional challenge in a short conclusory statement supported by a more lengthy footnote which offered no further clarification. 408 Mich at 466, fn. 15; 294 NW2d at 77 (1980), (Appendix A 37).

On a timely motion for rehearing in the state court, the City again asserted the Equal Protection challenge to the Act. City Motion for Rehearing, June 26, 1980. The Court denied the motion for rehearing, without opinion, by the same 4-3 majority that had initially rejected the challenge. Order of the Supreme Court of the State of Michigan denying motion for rehearing, July 15, 1980, 409 Mich 1011 (1980), Appendix C).

STATEMENT OF THE CASE

A majority of the Michigan Supreme Court rejected appellant City of Detroit's contentions that the state's compulsory arbitration law (1969 PA 312), violates both due process and equal protection clauses of the Fourteenth Amendment. The majority's decision was influenced by the purpose and intent of Michigan's compulsory interest arbitration law (1969 PA 312, as amended), "to afford an

alternate, expeditious, effective and binding procedure for the resolution of [municipal police and fire department] disputes," MCLA 423.231; MSA 17.455(31). (A 23)[1]

Noting that many commentators, and most state courts had found compulsory, public arbitration statutes valid, the majority felt "compelled to conclude that 1969 PA 312 . . . is constitutional in all respects," (A 28)

During negotiations in 1977 between the City and the Detroit Police Officers Association (DPOA), the City offered a three-year contract, calling for a 13 percent salary increase, spread over that period. (A 26). The package, similar to that accepted by other city employee unions, would have maintained the Detroit police among the highest paid in the nation. (B 117)

The City proposed to drop from the new contract a cost of living allowance (COLA), provided for in an earlier contract because the City's financial condition would not enable payment of this provision. The DPOA insisted on retention of the COLA and demanded, as provided in the act, that the issue be resolved by arbitration. (A 29)

The City initiated this litigation on January 9, 1979, after the arbitration panel, by a 2 to 1 vote, accepted the police officers' offers to preserve the existing cost of living allowance (COLA) agreement with a lower increase in wages than that proposed by the City. (A 31)[2]

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[1] The court also cited the fact that "at least 20 jurisdictions including Michigan have enacted legislation providing for binding arbitration for public employees, or specifically for police and fire fighters." (A-26-17)

[2] The DPOA and the Detroit Fire Fighters Association (DFFA) intervened in the City's suit. The two groups sought immediate enforcement of the arbitration panel's award, which relief was granted by the trial court on February 13, 1978. (A-31-32)

The City had warned that such an award would worsen its already grave financial condition and would likely necessitate the dismissal of 700 police officers at a time of soaring unemployment and increased crime. The lay-offs moreover would disproportionately affect minorities and women, many of whom had been recruited, hired and promoted in compliance with an affirmative action program challenged in court by the DPOA and a number of white Detroit policemen. The program was approved on appeal by a unanimous panel of the Sixth Circuit. *Detroit Police Officers' Association v. Young*, 608 F.2d 671 (6th Cir. 1979).

The court in the *Young* case deemed the City's program a potentially appropriate mechanism to remedy past racial discrimination in the hiring and promotion of black policemen. It also noted that corrective action had been taken following studies showing that racial unrest in Detroit, including the tragic civil disturbances in July 1967, were caused by, *inter alia*, widespread alienation of black residents from the Detroit Police Department.

As appellant reported to the Michigan Supreme Court in its Motion For Rehearing, budetary constraints now have necessitated the lay-offs of 700 police officers, three-fourths of whom are minorities. As a result, the City's police force will drop to less than 26 percent minority officers in a city which is more than 55 percent Black.[3]

---

[3] The City's brief (pp. 4-5) advised the Michigan Supreme Court:

> In 1967 the City of Detroit was approximately 40% Black and 60% White, yet its police force was only 4 - 5% Black. Despite increased recruiting efforts through 1974, the number of minority officers had only risen to 18% while the City's minority population had risen to nearly 50%. The Sixth Circuit Court of Appeals found these figures constituted a

(cont'd. on following page)

In addition, other City unions which had agreed to give up their cost-of-living-allowance (COLA) provisions because of the City's precarious financial situation, can be expected to enter demands for parity with the award to City policemen made by the state-imposed arbitration panel.

Pre-litigation History of Act 312.

As originally drafted, all three members of the arbitration panel convened under Act 312 could be private citizens. The public employer and the union each chose their own panel delegate [MCLA 423.234; MSA 17.455(34)]; who in turn chose the arbitrator chairman [MCLA 423.235; MSA 17.455(35)]. Only if the parties' panel delegates could not agree on an impartial chairman did the chairman of the Michigan Employment Relations Commission (MERC) step in to select a panel chairman [MCLA 423.235; MSA 17.455(35)].

(cont'd. from preceding page)

> "gross disparity" which together with proof of other discriminatory practices imposed "a constitutional duty (upon the City) to eliminate discrimination and its effects."
>
> At present there are 1,650 minority police officers in the Detroit Police Department or 33% of the force. As a result of the arbitration panel's economic award more than 700 police officers will have to be laid off in the near future. The parties collective bargaining agreement requires the layoffs be based upon inverse seniority. Since almost half of the City's minority officers have been hired in the last six years, approximately 74% of the officers to be laid off are minorities and/or women.
>
> The gains made as a result of the City's affirmative action program will be obliterated. The City's police force will be composed of less than 26% minority officers in the city which is more than 55% Black. Clearly this again constitutes a gross disparity.
>
> During the arbitration hearing, the City argued that acceptance of the Union's proposed wage package would force the City to reduce services.

The panel chairman's tenure was for only the duration of the dispute he was selected to hear. He (or she) was a "one time" arbitrator, free, as it were, once the award was issued, to ride off into the sunset, leaving the municipality involved in the arbitration solely to its own devices, however meager, to attempt to comply with the award.

In *Dearborn Fire Fighters Union, Local No. 412* v. *City of Dearborn*, 394 Mich 229, 231 NW2d 227, the State Supreme Court split 2-2 on the issue of the constitutionality of Act 312 as it was then written. Two Justices noted that the lower court's approval of the act was affirmed solely because the act had not been administered as written. Both justices found the Act unconstitutional as an unlawful delegation of legislative power to politically unaccountable arbitrators. As one of them, Justice Levin explained it:

> "It is the unique method of appointment, requiring independent decision makers without accountability to a governmental appointing authority and the unique dispersal of decision-making power among numerous ad hoc decision makers, only temporarily in office, precluding assessment of responsibility for the consequences of their decision on the level of public services, the allocation of public resources and the cost of government which renders invalid this particular delegation of legislative power." 231 NW2d 226, 241.

One justice affirmed on the narrow ground that when the MERC chairman selected a neutral arbitrator because the city declined to name a delegate, the designation by an official appointed by the governor rather than the parties themselves rendered the delegation constitutional.

Subsequent to the *Dearborn* decision, the Michigan legislature amended Act 312. The new amendments

provided that the Michigan Employment Relations Commission (hereinafter MERC) shall establish and appoint a panel of arbitrators who would serve for indefinite terms but who could be removed at any time without cause [MSA 17.455(35)(2)]. The amendments also provided that upon initiation of Act 312 proceedings, MERC would present to the respective parties a list of three arbitrator-nominees from its panel of arbitrators. Each of the parties would then have the right to preemptorily strike the name of one of the arbitrator-nominees, MERC would then select the Act 312 panel chairman from the remaining name(s). [MSA 17.455(35)(1)].

Litigation History in the Instant Case

Appellant contended below that the constitutional infirmities of Act 312 as it operated at the time of the decision in *Dearborn Fire Fighters Association, supra,* were not cured by the amendment to the Act. The constitutional infirmity concerning an arbitrator/chairman selected by the parties' delegates also exists in regards to an arbitrator/chairman appointed by the chairman of MERC pursuant to the provisions of Act 312 as currently written.

Under either procedure, appellant argued, due process standards are violated by a statute granting power to a "decision maker who does not have continuing responsibility, to make critical choices on economic and non-economic issues without political accountability," *Dearborn Fire Fighters, supra,* 231 NW2d at 242. Justices Levin and T.G. Kavanaugh found that the arbitrator/ chairman was not politically accountable either to his putative political superiors, the chairman of MERC and the Governor, or to the public generally. In their view, the same reluctance on the part of the Governor or the MERC chairman to "intru[de] on the independence of the

'impartial' decision maker," noted by Justice Levin in *Dearborn Fire Fighters, supra,* is dictated by the amended Act requiring appointment of an "impartial arbitrator; MCLA 423.235 just as it did prior to the amendment.

Appellant pointed out below and the dissenters agreed that the "act's standards rather than 'significantly channel[ing],' or 'trenchantly circumscrib[ing]' the panel's decision-making authority, are sufficiently amorphous to allow a panel confronted with a given set of evidence to reach (and justify) a result in favor of either party on virtually any issue." (A 117)

The factors the arbitration panel are constricted to consider, including the interests and welfare of the public, the government's financial ability, and a comparison of wages sought with those paid in "comparable communities," public and private, were deemed vague and nebulous. They pointed out that no priority is set among the criteria with the result decisions are rendered invulnerable to judicial review if reliance on one or more of the criteria is claimed.

The chairman of the panel does not merely find the facts and apply established policy, but must formulate policy on the most crucial subjects facing the City government, all without meaningful safeguards. Because the arbitrators serve on an *ad hoc* basis, there is no visible or intelligible principles of decision, and no chairman need attempt to follow the decision of another chairman, or develop a coherent body of law.

Finally, while intended to limit their discretion, the provision requiring arbitrators to accept the last best offer on each issue, and according to the dissent, "exacerbates rather than cures the deficiencies which lead us to conclude that the act is unconstitutional, . . ." (A 99, 105)

In this case, the arbitrator determined to give little weight to the appellant City's testimony concerning its financial plight because there was no allegation that approval of the appellee union offer would place appellant in bankruptcy. (A 127-128) In addition, he decided to award the cost of living allowance (COLA) sought by the police union because a similar award, challenged in a still pending law-suit by appellant, had been awarded to the police Lieutenants and Sergeants Association.

Finally, the arbitrator disassociated himself from responsibility for the (COLA) award which over the period of the contract will cost appellant City (and its taxpayers) well over $100,000,000.00 dollars and literally thousands of hours of police protection lost because of compelled layoffs. He explained that had he been free to reach a result which he regarded most in accord with the factors delineated by the Legislature, rather than forced to choose the last best offer, he would have selected an amount that would have substantially reduced the total cost of the award. (A 142)

THE QUESTION IS SUBSTANTIAL

This litigation grows out of a political and economic dilemma facing the elected officials of many American cities, including those in the appellant City of Detroit. Spiraling inflation pushes the cost of government steadily up while hardpressed taxpayers rebel against higher taxes, reject new bond issues, and enact legal lids on expenditures. Faced with these realities of governance, should municipal officials attempt to meet wage demands of city employees by extending deficit financing to the brink of bankruptcy? Or, should officials hold the budgetary line and face disruptive and potentially chaotic

strikes in areas of public service crucial to health, safety, and well-being?

Manifesting more concern for avoiding disruptive strikes by public employees than in observing fourteenth amendment standards, the Michigan legislature enacted a compulsory arbitration law that transgresses fourteenth amendment boundaries in two areas: (1) Empowered to decide the most crucial issues facing city officials, the arbitrator is provided only vague and nebulous standards, he must select from the last best offer of either side as to each issue to make crucial policy decisions. (2) Unguided by even minimal standards, the act transfers virtually unlimited authority from duly elected officials to the ad hoc arbitrators.

I

Even if a delegation of key budgetary power from governmental officials to appointed arbitrators were otherwise valid, the absence of meaningful standards for the arbitration panel's decision in an interest arbitration proceeding, would violate fundamental due process standards as the following detailed review clearly shows.

Section 9 of Act 312 (E 7-8) purports to provide "factors" on which the arbitration panel "shall base its findings, opinions and order," but the factors required to be considered by the arbitration panel are so vague that they are incapable of guiding the arbitration panel. The factors are "sufficiently amorphous to allow the chairman [of the arbitration panel] to reach and justify a result in favor of either party on any issue." (A 117) The arbitration panel is thus left-free — indeed is virtually compelled — to make arbitrary decisions having no real rationale, no basis for serving as precedents in cases considered by future

arbitration panels, and no means of providing settlement-inducing guidance to parties in future disputes. To delegate legislative power affecting municipal affairs to a politically unaccountable panel of arbitrators, without appropriate safeguards against arbitrariness is "so unreasonable and capricious as to violate the due process clauses of . . . the United States Constitution." *Town of Berlin* v. *Santaguida*, 98 LRRM 3259, 3267 (1978). See *Kelley* v. *Johnson*, 425 U.S. 238, 244, (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 572, (1972).

Section 9 of Act 312 attempts to establish guiding criteria for arbitration panels in the following abortive manner:

Factor "(a)": The lawful authority of the employer.

The "lawful authority" standard is a meaningless redundancy, since the "employer" obviously may not exceed in any way its constitutional or statutory authority in any endeavor, including its role as a party in Michigan's statutory collective bargaining process.

Factor "(b): Stipulations of the parties.

The stipulation standard simply removes from the arbitration panel's consideration matters on which the parties have reached an agreement and agreed-upon subsidiary matters that might bear on the arbitration panel's consideration of other statutory "factors." Thus, the stipulation standard has virtually no bearing on the issue of how the arbitration panel will resolve remaining contested matters the parties have placed before the arbitration panel. The "stipulations" factor performs the obvious and redundant function of limiting the arbitration panel to decisions in disputed matters.

Factor "(c)": The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

Standing alone, the "interests and welfare" factor is so vague as to be meaningless. Read together with the connecting phrase, "financial ability of the unit of government to meet those costs," the meaninglessness of this "factor" is compounded. No standards are provided to assist the arbitration panel in determining the "financial ability" of a governmental unit to meet costs. Is money available to meet the "costs" of an arbitration award if the amount of money required to satisfy an award considered by the arbitration panel is in the governmental unit's budget, but has been allocated to uses other than salaries for the constituency of a union party to the arbitration proceedings? Or does "financial ability" mean the availability of unallocated budget funds? Even if that narrow question is resolvable by way of judicial interpretation of Act 312, a host of other unanswerable questions concerning the meaning of "financial ability" are inherent in the term. Does "financial ability" mean ability to pay without laying off current employees to meet the costs of an arbitration award? And, if not, how many employees must be laid off before the City acquires the "financial ability" to pay remaining employees? Answers to such questions are not only beyond the power of an arbitration panel established under Act 312 to provide — except by arbitrary guess, they are also outside the ability of courts to provide — except by arbitrary guess. Yet, these are matters of critical concern in this litigation, since, as is argued elsewhere in this jurisdictional statement, the threatened layoff of minority police officers in the face of a federal district court's affirmative action decree, and the conflict between the requirements of the decree and the

consequences of the arbitration panel's award, present an important federal question for this Court's resolution.

> *Factor "(d)": Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing silimar services and with other employees generally:*
>
> *(i) In public employment in comparable communities.*
> *(ii) In private employment in comparable communities.*

Attempting to apply this "factor," the arbitration panel is compelled to arbitrarily determine for itself what constitutes a "comparable community." Should the "comparable community" be comparable in size, governmental structure, taxing power, budget allocations? A combination of these? And if several communities are "comparable" — by whatever standard might be fashioned to make that determination — with which of those "comparable communities" shall the arbitration panel make its comparisons?

"Comparable communities" — by whatever standard that term is defined — will vary considerably in the amount of wages and other benefits enjoyed by their employees. Thus, with no rational means of defining or selecting a "comparable community," the arbitration panel's focus must unavoidably fall on the ascertainable wage and benefit data in the communities considered. Unavoidably, the choice of a comparable community will arbitrarily match the predetermined views of the arbitration panel.

Factor "(e)": The average consumer prices for goods and services, commonly known as the cost of living.

Though this factor is at least ascertainable, it suffers — as do the unascertainable factors — from an ability to be assigned whatever weight the arbitration panel might arbitrarily assign. Or, the "consumer price" factor might be ignored entirely by the arbitration panel by its assignment of conclusive weight to other factors. No reviewing court could make a rational determination that the panel assigned the incorrect quantum of weight to this or any other factor, since the statute makes no requirement that the statutory facts be ranked in any order of importance.

Factor "(f)": The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

This factor merely states the obvious in requiring the arbitration panel to consider the threshold matter of current wages and benefits. Obviously the arbitration panel could not rationally or practically consider proposed wages and benefits without taking note of present wages and benefits as a frame of reference.

Factor "(g)": Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

This factor compounds the problems noted above in respect to the vague and amorphous standards found in

Section 9. If financial ability is incapable of being rationally determined because it is subject to so many differing and conflicting interpretations, it is necessarily impossible to weigh the effects of changes in "financial ability." If, in applying the "comparable community" factor, the arbitration panel arbitrarily (as it must) selects a "comparable community," any consideration of "changes" in any selected "comparable community" would compound the arbitrariness of the selection. Consideration of "changes" as a compounder of arbitrariness in the application of other factors, suffuses the entire Section 9 scheme.

> *Factor "(h)": Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.*

This catch-all provision provides not the slightest suggestion of what is meant by "normally or traditionally" taken into consideration in setting wages and other employment benefits. This factor, more than any other and all others combined, gives the arbitration panel carte blanche authority to do anything for any reason. Its application is beyond the power of courts to review, since nothing instructs as to how it might be applied. And, indeed, no general rules are capable of defining how the collective bargaining process ought to proceed.[4]

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[4] One of America's foremost labor law scholars has described the inexactitudes of collective bargaining, as follows:

> So the parties seek to negotiate an agreement to provide the standards to govern their future action.

(cont'd. on following page)

Collective bargaining is simply too dynamic a process to permit the fashioning of realistic guidelines for third-party neutrals. See Cox and Dunlop, Regulation of Collective Bargaining By The National Labor Relations Board, 63 Harv. L. Rev. 389 (1950). In requiring the consideration of "other factors normally or traditionally" considered, factor "(h)" imposes on the arbitration panel the task of applying non-existent criteria. Thus factor "(h)" completes the guidelines with a phantom standard characteristic of section 9. It both contradicts the dynamic flexibility of collective bargaining, and violates the Fourteenth Amendment's due process standards.

(cont'd. from preceding page)

> In this endeavor they face problems not unlike those encountered wherever attempt is made to legislate for the future in highly complex affairs. The parties seek to forsee the multitude of variant situations that might arise, the possible types of action that might then be available, the practicalities of each and their anticipated advantages or disadvantages. Choice between the suggested possibilities is rendered more difficult by the very process of bargaining and the subsequent administration of the bargain. The negotiations are necessarily conducted by representatives removed in variant degrees from direct confrontation with the anticipated situations. They act on the basis partly of their own experience and partly of the more or less incomplete or clashing advice of constituents — the resolutions of councils, subcouncils, unit and departmental meetings in the case of the union, and the suggestions from individuals at the various levels of management in the case of the employer. While each area of problems — vacations, overtime, promotions, layoffs, and the like — must be separately and carefully considered, each is nevertheless but a small part of the total negotiation. The pressure for trade or compromise is ever present. Shulman, *Reason, Contract, And Law In Labor Relations*, 68 Harv. L. Rev. 999, 1003, 1004 (1955).

II

The court below understood appellant as challenging 1969 PA 312, as "an unconstitutional delegation of "legislative and political responsibility to politically unaccountable arbitrators, . . ." (A-24) But in the context of this case, the state's transfer of governmental power is far more than a mal-redistribution of authority.

The Michigan legislation was spurred to action by the unexamined belief that public employee strikes rather than the granting of budget-busting wage demands, are the greater threat to public order and security. But in approving the compulsory process which required the appellant City to submit to an appointed panel's decision, the court below ignored principles of local control which this Court has so extolled in other important contexts. See, e.g., *Milliken* v. *Bradley*, 418 U.S. 717 (1974), recognizing the importance of local autonomy to the maintenance of community concern and support for the public schools; *James* v. *Valtierra*, 402 U.S. 137 (1971), affirming a community's right to a voice via referenda in decisions that could entail large expenditures of local governmental funds; *City of Mobile, Ala.* v. *Bolden*, 100 S.Ct. 1490 (1980), upholding a community's preference for at-large elections of city commissions.[8]

In the three cases just cited, *Milliken*, *Valtierra*, and *City of Mobile*, the judicial weight assigned to the principle of local control served to legitimate policies challenged as racially disciminatory. The black plaintiffs were unable to

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[8] And *cf.*, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), rejecting extension of federal minimum wage and maximum hour standards to state and local employees which would impair sovereign decision-making powers of state and local officials.

prove the policies were invidiously disciminatory, *Washington* v. *Davis*, 426 U.S. 229 (1976), though the disadvantage they suffered under the impact of each was clear.

Here, appellant does not charge that PA 312 is unconstitutional because enacted to discriminate against the black mayor, and predominantly black city council and population of Detroit. But, it is clear that the statute as administered in the instant case, has denied appellant officials and the electorate local control as to public policies of the most critical kind.

Of course, in the equal rights cases, a city was not challenging the validity of the legislative enactments, cf. *Hunter* v. *Pittsburgh*, 207 U.S. 161 (1907), but significantly the court below did not summarily reject appellant's appeal on the theory that the city is simply a creature of the state, but examined the validity of the compulsory arbitration act in detail.

What it failed to do is evaluate the budgetary, domino-effect of the arbitrator's decision. To illustrate, appellant reported in the Act 312 hearings that of the 1977-78 total City of Detroit Police Department Budget of $232.1 million, 96 percent went for personnel costs. Personnel services are almost 70% of the total City budget. (App. 370a).

Thus, it is possible to see that a large proportion of the decision-making power with respect to the personnel budget of the City and an even larger proportion of the union budget is given over the arbitrator. This is an extensive delegation of authority, indeed, particularly considering the rippling effect Act 312 awards as to wages and fringe benefits have on City employees not directly

covered by the Statute. *Dearborn Fire Fighters*, 394 Mich at 250, 231 NW2d at 232.

To explain, while Act 312 ostensibly covers only critical municipal employees, including policemen, firemen or persons subject to the hazards thereof, emergency medical service personnel and emergency telephone operators employed by a police or fire department (MCLA 423.232), the awards granted by an Act 312 panel have a rippling effect on the employment conditions and level of compensation paid general municipal employees, and also sets precedents for employees of other municipalities.

The magnitude of the delegation can be readily understood by reviewing the effect of the authority granted to arbitrators to make final and binding decisions with respect to salaries and fringe benefits. It is widely acknowledged that the wages and fringe benefits paid to public employees constitute a major portion of the operating budget of virtually every municipality. With respect to the uniformed services, the 1978 Municipal Year Book states that "approximately 75% to 90% of the typical police, fire, and refuse department budgets (are) devoted to salaries and fringe benefits." International City Management Assn., *The Municipal Year Book*, 146 (1978).

Thus, under Act 312, it is the arbitrator and not the city officials who must ultimately decide how the City's budget is to be allocated. The duly elected officials are reduced to implementing the allocations made, and, in Detroit, facing the political heat for unpopular and unavoidable actions: reductions in police protection, non-compliance with affirmative action court orders, and demands for wage parity by other public employee unions, based on

policy decisions which they didn't make and in fact, strongly opposed.

In the several "one-man, one-vote" cases relating to congressional, state and municipal elections, this Court has repeatedly observed that the right to cast an effective vote is the very cornerstone of our democratic society. In *Wesberry* v. *Sanders*, 376 US 1(1964), the court stated:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Id. at 17-18.

Similar language is to be found in *Reynolds* v. *Sims*, 377 US 533 (1964) and *Avery* v. *Midland County*, 390 US 474, 400, (1968).

In *Avery, supra*, the Court was equally cocerned with substance as with form in upholding "the right to an equally effective vote in the election process at the local government level, and it logically follows that the local government representatives elected by the people must have the authority to make meaningful decisions concerning the matters entrusted to their discretion by the state legislature.

The one-man, one-vote principle has generally been applied to gauge the validity under the equal protection clause of bodies with general legialative powers, rather than appointive boards with administrative duties. *Sailors* v. *Board if Education*, 387 US 105 (1967). But despite its arbitration function, PA 312 constitutes the delegation of essential decision-making authority over matters of traditional governmental concern to a non-elected arbitrator who has no political accountablitity to the

electorate. Unless the representatives elected by the people at the local level retain decision-making authority with respect to wages, hours and working conditions of their employees, voting for such representatives is meaningless, particularly since it is only such representatives who can be held politically accountable.

As Justice Powell noted in his concurring opinion in *Abood* v. *Detroit Board of Education*, 431 US 209, (1977), "Under our democratic system of government, decisions on these critical issues of public policy have been entrusted to elected officials *who ultimately are responsible to the voters*." (Emphasis added). Thus, unless the one-man one-vote principle is read to protect both municipal officials and citizens alike from the political emasculation of well-intended but no less destructive legislative enactments, the impressive protection provided by this Court against direct dilution of a local communtiy's vote will mean very litte indeed.

Is is one thing to approve, as this Court did in *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60 (1978), a state law giving a city taxing and regulatory authority over those residing within three miles of the city's corporate boundaries without permitting such residents to vote in municipal elections. It is quite another matter for the state to allow the residents of appellant City to vote and elect municipal officials and then by law allow an appointed arbitrator to usurp their budgetary discretion while leaving them with the obligation to govern responsibly a financially troubled town with a deep history of racial tenisons.

This Court's failure to recognize and redress this denial of fourteenth amendment protection to Detroit's citizens would be particularly regrettable. Just last term, a majority of this Court in *City of Mobile* v. *Bolden*, 100 S Ct 1490 (1980)

rejected the claim by Mobile's black voters that the at-large election scheme made the election of black representatives impossible while insuring that white representatives would not be responsive to the needs of black citizens. Emphasizing that blacks have no right to have their candidates elected, the majority held that the Constitution guarantees only the equal right to cast an unhindered vote.

Blacks in Detroit have not sought more than this right. They have organized politically, elected candidates of their choice and, having played by the system's rules, should not be required to witness the legislative transfer of power from their duly elected representatives to state-appointed figures over whom they have no control.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

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